



9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG-2011-1108]

RIN 1625-AA11, 1624-AA00

Safety Zone and Regulated Navigation Area, Chicago Sanitary and Ship Canal, Romeoville, IL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing both a safety zone and a Regulated Navigation Area on the Chicago Sanitary and Ship Canal near Romeoville, IL. This final rule places navigational, environmental, and operational restrictions on all vessels transiting the navigable waters located adjacent to and over the U.S. Army Corps of Engineers' electrical dispersal fish barrier system.

DATES: This rule is effective in the CFR on [INSERT DATE PUBLISHED IN THE FEDERAL REGISTER]. This rule is effective with actual notice for purposes of enforcement at 5:30 p.m. on December 1, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG-2011-1108 and are available online by going to www.regulations.gov, inserting USCG-2011-1108 in the "Keyword" box, and then

clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, D.C. 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call CDR Scott Anderson, U.S. Coast Guard, Ninth District Prevention Department, Cleveland, OH, at (216) 902-6049 or email him at scott.e.anderson@uscg.mil. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the Federal Register. A 30 day effective period is unnecessary in this case because the safety zone and regulated navigation area (RNA) established by this rule have been in effect and enforced on a temporary basis for the last twelve months. Also, a 30 day effective period would be against the public interest. Delaying the effective date of this final rule would delay its protective effects on the public against the dangers presented by the

electrical dispersal barrier. Additionally, postponing the effective date of this final rule would delay its protective effects against the potential transport north of the barrier of carp eggs, gametes, or juvenile fish and thus, would be against the public's environmental interests.

Basis and Purpose

In response to the threat of Asian carp reaching the Great Lakes and devastating the Great Lakes commercial and sport fishing industries, the U.S. Army Corps of Engineers (USACE) began in 2002 the operation of a series of electrical barriers in the Chicago Sanitary and Ship Canal (CSSC). These barriers are located approximately 30 miles from Lake Michigan and create an electric field in the water by pulsing low voltage DC current through steel cables secured to the bottom of the canal. Currently, three electrical barriers are in operation. These barriers are meant to prevent and reduce the dispersal of Asian carp in the CSSC.

The Coast Guard's Ninth District Commander has determined that the electric current radiated from the electric barriers poses certain safety risks to commercial vessels, recreational boaters, and people on or in portions of the CSSC in the vicinity of the barriers. Consequently, the Coast Guard's Ninth District Commander has concluded that an RNA is necessary to mitigate such risks.

In addition to safety concerns about electric current in the water, concerns have also been raised about the potential transport of carp eggs, gametes, and juvenile fish in bilge, ballast, or other non-potable water from south of the barriers to waters north of the barriers. To address these concerns, the Coast Guard's Ninth District Commander has determined that a safety zone is necessary to mitigate the threat of such transportation.

For a fuller discussion on the history of the electrical dispersal barriers and the potential transportation of eggs, gametes, and juvenile fish across the barriers see 70 FR 76694, 75 FR 754, and 75 FR 75145, which were published on December 28, 2005, January 6, 2010, and December 2, 2010 respectively.

Background

To address the aforesaid safety risks, the Coast Guard's Ninth District Commander first established a permanent RNA on December 28, 2005 (70 FR 76694). That RNA is located at 33 CFR 165.923. Because the safety risks associated with the electrified water evolved as additional barriers came online and because awareness increased about the potential transportation of carp eggs, gametes, and juvenile fish, the Coast Guard's Ninth District Commander twice elected to temporarily put in place a new RNA and a new safety zone. The first temporary RNA and safety zone

were established on January 6, 2010 (75 FR 754). The second temporary RNA and safety zone were established on December 2, 2010 (75 FR 75145). In each instance, the Coast Guard's Ninth District Commander suspended the permanent RNA created on December 28, 2005.

The electric barriers are still in operation, and there are no indications of that their use will be terminated in the foreseeable future. Also, the potential transportation of carp eggs, gametes, and juvenile fish via bilge, ballast, or other non-potable water has not been disproved. For these reasons, the Coast Guard's Ninth District Commander has decided to revise 33 CFR 165.923 and thus, make effective and enforceable at 5:30 p.m. on December 1, 2011 the requirements that have been in place since December 2, 2010 via the aforesaid temporary interim rule (75 FR 75145).

Discussion of Rule

As stated above, the Coast Guard's Ninth District Commander has decided to revise 33 CFR 165.923 via this final rule, permanently putting in place an RNA on all waters located adjacent to, and over, the electrical dispersal barriers on the CSSC between mile marker 295.5 and mile marker 297.2. An RNA of this size is necessary to account for situations where a vessel inside the barrier could come into contact with a vessel outside the barrier

possibly causing sparking greater than 1,200 feet beyond the Romeo Road Bridge or the aerial pipeline arch.

The RNA establishes vessel size, type, and operating requirements to include: (1) vessels must be greater than twenty feet in length; (2) vessel must not be a personal watercraft of any kind (*i.e.* jet skis, wave runners, kayak, *etc.*); (3) all up-bound and downbound commercial tows that consist of barges carrying flammable liquid cargos (grade A through C, flashpoint below 140 degrees Fahrenheit, or heated to within 15 degrees Fahrenheit of flash point) must engage the services of a bow boat at all times until the entire tow is clear of the RNA; (4) vessels engaged in commercial service, as defined in 46 U.S.C 2101(5), may not pass (meet or overtake) in the RNA and must make a SECURITE call when approaching the RNA to announce intentions and work out passing arrangements on either side; (5) commercial tows transiting the RNA must only be made up with wire rope to ensure electrical connectivity between all segments of the tow; (6) all vessels are prohibited from loitering in the RNA; (7) vessels may enter the RNA for the sole purpose of transiting to the other side and must maintain headway throughout the transit; (8) all vessels and persons are prohibited from dredging, laying cable, dragging, fishing, conducting salvage operations, or any other activity, which could disturb the bottom of the RNA; (9) all personnel on

vessels transiting the RNA should remain inside the cabin, or as inboard as practicable. If personnel must be on open decks, they must wear a Coast Guard approved personal flotation device; (10) vessels may not moor or lay up on the right or left descending banks of the RNA; and, (11) towboats may not make or break tows if any portion of the towboat or tow is located in the RNA.

The rule also places a safety zone over a smaller portion of the same waterway. The safety zone will consist of all waters of the CSSC between mile marker 296.1 and mile marker 296.7. Vessels are prohibited from transiting the safety zone with non-potable water on board in any space except for water on board that will not be discharged on the other side of the safety zone. Vessels must notify and obtain permission from the Captain of the Port Sector Lake Michigan prior to transiting the safety zone if they intend to discharge any non-potable water attained on one-side of the safety zone on the other side of the zone. This includes water in void spaces being unintentionally introduced through cracks or other damage to the hull. The Captain of the Port Sector Lake Michigan maintains a telephone line that is manned 24 hours a day, seven days a week at 414-747-7182.

The requirements established in this rule are necessary for safe navigation of the RNA and to ensure the safety of

vessels and their personnel as well as the public in general. The requirements are also necessary to protect against the harms presented by a potential invasion of Asian carp in Lake Michigan. Deviation from this final rule is prohibited unless specifically authorized by the Coast Guard's Ninth District Commander or his or her designated representatives. For the life of this RNA, the Coast Guard's Ninth District Commander designates as his or her representatives the Captain of the Port, Sector Lake Michigan, and the Commanding Officer, Marine Safety Unit Chicago.

The safety zone and RNA will be enforced at all times. If, however, enforcement of the safety zone or RNA is at any time suspended, the Coast Guard's Ninth District Commander or his or her designated representatives will cause notice of the suspension to be made by all appropriate means to effect the widest publicity among the affected segments of the public.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under

section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

This rule will affect commercial traffic transiting the electrical dispersal fish barrier system and surrounding waters. The USACE maintains data about the commercial vessels using the Lockport Lock and Dam, which provides access to the proposed RNA. According to USACE data, the commercial traffic through the Lockport Lock consisted of 147 towing vessels and 13,411 barges during 2007. Of those, 96 towing vessels and 2,246 barges were handling red flag cargo (i.e., those carrying hazardous, flammable, or combustible material in bulk).

Recreational vessels will also be affected under this rule. According to USACE data, recreational vessels made up 66 percent of the usage of the Lockport Lock and Dam in 2007. Operation and maintenance of the USACE fish barrier will continue to affect recreational vessels as they have in the past. The majority of these vessels will still be able to transit the RNA under this rule. The potential cost associated with this rule will include alternative transportation methods for vessels under 20 feet in length, bow boat assistance for red flag vessels and the potential

costs associated with possible delays or inability to transit the safety zone for those vessels transporting non-potable water attained on one side of the barrier for discharge on the other.

We expect some provisions in this rule will not result in additional costs. These include the no loitering, the no mooring, and the PFD requirements. Similar to prior temporary interim rules, under this final rule vessels are prohibited from mooring or loitering in the RNA and all personnel in the RNA on open decks are required to wear a Coast Guard approved Type I personal flotation device. Most commercial and recreational operators will have required flotation devices on board as a result of other requirements and common safe boating practices. Based on the past temporary interim rules, we observed no information and received no data to confirm there were additional costs as a result of these provisions.

In addition, test results at the current operating parameters indicate that the majority of commercial and recreational vessels that regularly transit the CSSC will be permitted to enter the regulated navigation area and safety zone under certain conditions. Those vessels that will not be permitted to pass through the barrier may be permitted, on a case by case basis, to pass via a dead ship tow by a commercial vessel that is able to transit.

We expect the benefits of this rule will mitigate marine safety risks as a result of the operation and maintenance of the fish barriers by the USACE. This rule will allow commerce to continue through the waters adjacent to and over these barriers. This rule will also mitigate the possibility of an Asian Carp introduction into Lake Michigan, and the Great Lakes system, as a result of commerce through the CSSC.

At this time, based on available information from past temporary interim rules, we anticipate that this rule will not be economically significant under Executive Order 12866 (i.e., have an annual effect on the economy of \$100 million or more).

Small Entities

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) requires agencies to consider whether regulatory actions would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

A final RFA analysis is not required under 5 U.S.C. 604(a) as this final rule was determined to be exempt from notice and comment rulemaking under 5 U.S.C. 553(b)(B) (see

75 FR 754). Nonetheless, the Coast Guard certifies under 5 U.S.C. 605(b), that this final rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321-4370f), and have concluded that this action is one of the category of actions which do not individually or cumulatively have significant effect on the human environment. Therefore, this rule is categorically excluded, under section 2.B.2 Figure 2-1, paragraphs (27) and (34)(g) of the Instruction and neither an environmental assessment nor an environmental impact statement is required. This rule involves the establishing, disestablishing, or changing of a regulated navigation area and safety zone and thus, paragraphs (27) and (34)(g) of the Instruction apply. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record keeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 165 as follows:

PART 165 – Regulated Navigation Areas and Limited Access Areas

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Revise § 165.923 to read as follows:

§ 165.923 Safety Zone and Regulated Navigation Area, Chicago Sanitary and Ship Canal, Romeoville, IL.

(a) Safety Zone. (1) The following area is a safety zone: all waters of the Chicago Sanitary and Ship Canal located between mile marker 296.1 and mile marker 296.7.

(2) Regulations. (i) All vessels are prohibited from transiting the safety zone with any non-potable water on board if they intend to release that water in any form within, or on the other side of the safety zone. Non-potable water includes, but is not limited to, any water taken on board to control or maintain trim, draft, stability, or stresses of the vessel. Likewise, it includes any water taken on board due to free communication between the hull of the vessel and exterior water. Potable water is water treated and stored aboard the vessel that is suitable

for human consumption.

(ii) Vessels with non-potable water onboard are permitted to transit the safety zone if they have taken steps to prevent the release, in any form, of that water in or on the other side of the safety zone. Alternatively, vessels with non-potable water onboard are permitted to transit the safety zone if they have plans to dispose of the water in a biologically sound manner.

(iii) Vessels with non-potable water aboard that intend to discharge on the other side of the zone must contact the Coast Guard's Ninth District Commander or his or her designated representatives prior to transit and obtain permission to transit and discharge. Examples of discharges that may be approved include plans to dispose of the water in a biologically sound manner or demonstrate through testing that the non-potable water does not contain potential live Silver or Asian carp, viable eggs, or gametes.

(iv) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone by vessels with non-potable water on board is prohibited unless authorized by the Coast Guard's Ninth District Commander, his or her designated representatives, or an on-scene representative.

(v) The Captain of the Port, Sector Lake Michigan, may further designate an "on-scene" representative. The Captain of the Port, Sector Lake Michigan, or the on-scene representative may be contacted via VHF-FM radio Channel 16 or through the Coast Guard Sector Lake Michigan Command Center at 414-747-7182.

(b) Regulated Navigation Area. (1) The following is a regulated navigation area (RNA): all waters of the Chicago Sanitary and Ship Canal, Romeoville, IL located between mile marker 295.5 and mile marker 297.2.

(2) Regulations.

(i) The general regulations contained in 33 CFR § 165.13 apply.

(ii) Vessels that comply with the following restrictions are permitted to transit the RNA:

(A) All up-bound and down-bound barge tows that consist of barges carrying flammable liquid cargos (Grade A through C, flashpoint below 140 degrees Fahrenheit, or heated to within 15 degrees Fahrenheit of flash point) must engage the services of a bow boat at all times until the entire tow is clear of the RNA.

(B) Vessels engaged in commercial service, as defined in 46 U.S.C. 2101(5), may not pass (meet or overtake) in the RNA and must make a SECURITE call when approaching the RNA to announce intentions and work out passing arrangements.

(C) Commercial tows transiting the RNA must be made up with only wire rope to ensure electrical connectivity between all segments of the tow.

(D) All vessels are prohibited from loitering in the RNA.

(E) Vessels may enter the RNA for the sole purpose of transiting to the other side and must maintain headway throughout the transit. All vessels and persons are prohibited from dredging, laying cable, dragging, fishing, conducting salvage operations, or any other activity, which could disturb the bottom of the RNA.

(F) Except for law enforcement and emergency response personnel, all personnel on vessels transiting the RNA should remain inside the cabin, or as inboard as practicable. If personnel must be on open decks, they must wear a Coast Guard approved personal flotation device.

(G) Vessels may not moor or lay up on the right or left descending banks of the RNA.

(H) Towboats may not make or break tows if any portion of the towboat or tow is located in the RNA.

(I) Persons on board any vessel transiting this RNA in accordance with this rule or otherwise are advised they do so at their own risk.

(c) Definitions. The following definitions apply to this section:

Bow boat means a towing vessel capable of providing positive control of the bow of a tow containing one or more barges, while transiting the RNA. The bow boat must be capable of preventing a tow containing one or more barges from coming into contact with the shore and other moored vessels.

Designated representative means the Captain of the Port Lake Michigan and Commanding Officer, Marine Safety Unit Chicago.

On-scene representative means any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port, Sector Lake Michigan, to act on his or her behalf. The on-scene representative of the Captain of the Port, Sector Lake Michigan, will be aboard a Coast Guard, Coast Guard Auxiliary, or other designated vessel or will be on shore and will communicate with vessels via VHF-FM radio or loudhailer.

Vessel means every description of watercraft or other artificial contrivance used, or capable or being used, as a means of transportation on water. This definition includes, but is not limited to, barges.

(d) Compliance. All persons and vessels must comply with this section and any additional instructions or orders of the Coast Guard's Ninth District Commander or his or her designated representatives. Any person on board any vessel transiting this RNA in accordance with this rule or otherwise does so at his or her own risk.

(e) Waiver. For any vessel, the Coast Guard's Ninth Coast Commander or his or her designated representatives may waive any of the requirements of this section, upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purposes of vessel and mariner safety.

DATED: December 1, 2011.

M. N. Parks,
Rear Admiral, U.S. Coast Guard
Commander, Ninth Coast Guard District

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